

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

June 27, 2007

SECRETARY OF LABOR,	:	EMERGENCY RESPONSE PLAN
MINE SAFETY AND HEALTH	:	DISPUTE PROCEEDING
ADMINISTRATION (MSHA),	:	
Petitioner	:	Docket No. PENN-2007-251-E
	:	Citation No. 7020004; 5/25/2007
v.	:	
	:	Mine ID 36-05466
EMERALD COAL RESOURCES, LP,	:	Emerald No. 1 Mine
Respondent	:	
SECRETARY OF LABOR,	:	EMERGENCY RESPONSE PLAN
MINE SAFETY AND HEALTH	:	DISPUTE PROCEEDING
ADMINISTRATION (MSHA),	:	
Petitioner	:	Docket No. PENN-2007-252-E
	:	Citation No. 7020005; 5/25/2007
v.	:	
	:	Mine ID 36-05018
CUMBERLAND COAL RESOURCES, LP,	:	Cumberland Mine
Respondent	:	

DECISION

Appearances: Stephen Turow, Esq., Gayle Green, Esq., Jonathan Hammer, Esq.,
U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, on behalf
of Petitioner;
R. Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania,
on behalf of Respondents;
Judith Rivlin, Esq., for United Mine Workers of America, appearing as *amicus*
curiae.¹

Before: Judge Zielinski

These cases are before me on Referrals of Emergency Response Plan Disputes, by the
Secretary of Labor ("Secretary"), pursuant to section 316(b)(2)(G) of the Federal Mine Safety

¹ The United Mine Workers of America moved to appear as *amicus curiae*, for the
purpose of filing a post-hearing brief. The parties did not object. The motion is granted, the
brief is accepted for filing, and was considered in this decision.

and Health Act of 1977, 30 U.S.C. § 876(b)(2)(G) (“Act”). At issue are citations issued on May 25, 2007, charging each of the Respondents, Emerald Coal Resources, LP, (“Emerald”) and Cumberland Coal Resources, LP, (“Cumberland”) with violations of the Act by failing to adopt response and preparedness plans that timely provide supplies of post-accident breathable air. A hearing was held in Pittsburgh, Pennsylvania on June 12, 2007, wherein the parties submitted all relevant material regarding the dispute. For the reasons set forth below, the citations are affirmed.

Findings of Fact – Conclusions of Law

In response to a series of tragic accidents in which underground coal miners lost their lives, Congress enacted the Mine Improvement and New Emergency Response Act of 2006 (“MINER Act”).² The MINER Act amended section 316 of the Mine Safety and Health Act of 1977, to require, *inter alia*, that underground coal mine operators develop and adopt response and preparedness plans (hereinafter “Emergency Response Plans” or “ERPs”), and submit them to the Secretary for approval and periodic review. The MINER Act became effective on June 15, 2006, and the initial ERPs were to be adopted and submitted by August 14, 2006. The Act requires that ERPs include several provisions intended to enhance the ability of trapped miners to survive an accident, including communication systems, a system for tracking miners, supplies of breathable air, and lifelines.

The requirements for post-accident breathable air are stated in section 316(b)(2)(E)(iii) of the Act:

Post-accident breathable air. -- The plan shall provide for —

(I) emergency supplies of breathable air for individuals trapped underground sufficient to maintain such individuals for a sustained period of time;

(II) in addition to the 2 hours of breathable air per miner required by law under the emergency temporary standard as of the day before the date of enactment of the Mine Improvement and New Emergency Response Act of 2006, caches of self-rescuers providing in the aggregate not less than 2 hours per miner to be kept in escapeways from the deepest work area to the surface at a distance of no further than an average miner could walk in 30 minutes

² P.L. 109-236 (June 15, 2006).

Section 316(b)(2)(C) of the Act provides that, in reviewing and approving ERPs, the Secretary is required to:

take into consideration all comments submitted by miners or their representatives,
Approved plans shall –

- (I) afford miners a level of safety protection at least consistent with the existing standards, including standards mandated by law and regulation;
- (ii) reflect the most recent credible scientific research;
- (iii) be technologically feasible, make use of currently commercially available technology and account for the specific physical characteristics of the mine; and
- (iv) reflect the improvement in mine safety gained from experience under this Act and other worker safety and health laws.

Section 316(b)(2)(G) of the Act provides a mechanism for expeditiously resolving disputes between operators and the Secretary over the content of ERPs.

Plan dispute resolution

(I) In general

Any dispute between the Secretary and an operator with respect to the content of the operator's plan or any refusal by the Secretary to approve such a plan shall be resolved on an expedited basis.

(ii) Disputes.

In the event of a dispute or a refusal [by the Secretary to approve a provision of an ERP,] the Secretary shall issue a citation which shall be immediately referred to a Commission Administrative Law Judge. The Secretary and the operator shall submit all relevant material regarding the dispute to the Administrative Law Judge within 15 days of the date of the referral. The Administrative Law Judge shall render his or her decision with respect to the plan content dispute within 15 days of the receipt of the submission.

After considerable negotiation, and submission of several alternative proposals, Respondents submitted ERPs specifying that post-accident breathable air would be provided by locating refuge chambers within 2,000 feet of each working section, capable of providing 96 hours of breathable air for miners, and that "Purchase orders . . . will be submitted to MSHA within 60 days of the approval of the Emergency Response Plan." Ex. G-13. Cumberland's last proposed ERP was submitted on May 22, 2007, and Emerald's was submitted on May 24, 2007.³

³ Emerald and Cumberland are affiliated companies of Foundation Coal, and their efforts to comply with the MINER Act and interactions with MSHA have been substantially identical. Tr. 107, 209.

Ex. G-13, G-25. The Secretary approved all parts of the ERPs' post-accident breathable air provisions, except the quoted language specifying that purchase orders would be submitted within 60 days of approval. Ex. G-19, G-31.

On May 25, 2007, the Secretary's Mine Safety and Health Administration ("MSHA") issued citations to Respondents charging them with violations of section 316(b) of the Act.⁴ The citations, as amended, directed that the violations be abated within ten days, i.e., by June 4, 2007. On May 30, 2007, pursuant to the Act, and Commission Procedural Rule 24, 29 C.F.R. § 2700.24, the Secretary referred the plan content disputes to the Commission. The referrals pray that the citations be affirmed and that Respondents be ordered to amend their ERPs to establish a 10-day period within which to provide purchase orders. Respondents' responses to the referrals pray that the citations be vacated and that the Secretary be directed to approve their ERPs with no provisions for purchase orders.

History of the Post-accident Breathable Air ERP Provisions

As noted above, the Act's provisions requiring post-accident breathable air are phrased in general terms. ERPs, which were to be adopted and submitted for review by August 14, 2006, were required to provide for emergency supplies of breathable air sufficient to maintain

⁴ Citation No. 7020004 was issued to Emerald, and Citation No. 7020005 was issued to Cumberland. Both contained substantially identical language. Citation No. 7020004 states, in the "Condition or Practice" section:

Emerald Coal Resources, L.P. violated 316(b)(2) of the Federal Mine Safety and Health Act (Mine Act), 30 U.S.C. 876(b)(2) by failing to develop, adopt, and submit to MSHA an emergency response plan (a/k/a "accident response plan") that timely provides a means for providing post accident breathable air to individuals who may be trapped underground. After significant discussion, Emerald Resources has refused to promptly provide purchase orders for the refuge chambers contemplated in its May 24, 2007 ERP or, in the alternative, to specify other acceptable means for promptly providing post accident breathable air for trapped miners. MSHA and Emerald are in dispute concerning period that is reasonable for the operator to take actions necessary to implement the post accident breathable air portion of its ERP. Thus this citation is being issued pursuant to 104(a) and 316(b)(2)(G)(ii) of the Mine Act.

MSHA has approved all portions of Emerald's May 24, 2007 ERP with the exception of the provisions in the Post-accident Breathable Air portion of the ERP that states the date on which Emerald will provide purchase orders for the refuge chambers.

individuals trapped underground for a sustained period of time. On July 21, 2006, MSHA issued Program Policy Letter P06-V-8 which stated:

A. Maintenance of Individuals Trapped Underground

The ERP should address the amount of post-accident breathable air necessary to maintain individuals trapped underground for a sustained period of time. Oxygen, compressed air, or other alternatives may be used to meet this requirement.

The Agency will need to thoroughly review and evaluate alternatives to assure that all safety and health risks are taken into consideration. Additional time and information is needed to make decisions on the type, amount and location of post-accident breathable air to be furnished for trapped miners.

The Agency will solicit further information from the mining community through a Request for Information (RFI) to assist in assuring that ERPs provide safe and reliable post-accident breathable air supplies for trapped miners. Subsequent to the RFI, MSHA will provide additional guidance on an expedited basis to address the availability of readily accessible breathable air that would be sufficient to maintain miners trapped underground for a sustained period of time.

Stip. 17.⁵

The initial ERPs submitted by Respondents on August 14, 2006, addressed the post-accident breathable air requirement by citing the caches of Self-Contained Self-Rescuers ("SCSRs"), which provide up to five or six hours of breathable air. On August 30, 2006, MSHA published a request for information in the Federal Register and sought comments on post-accident breathable air by October 16, 2006. Stip. 19; ex. G-1. On October 24, 2006, MSHA published Program Information Bulletin PO6-V-10 which stated in part:

On August 30, 2006, MSHA published a Request for Information (RFI) in the Federal Register seeking further information from the mining community on "topics related to post-accident breathable air that would be sufficient to maintain miners trapped underground for a sustained period of time." Once MSHA is able to review the information received, the Agency will provide additional guidance. In the meantime, however, mine operators shall gather information from available resources and provide for emergency supplies of breathable air.

Stip 20; ex. G-2. On February 8, 2007, MSHA issued Program Information Bulletin P07-03 ("PIB"), which included several attachments, and provided operators for the first time with comprehensive information concerning how to provide breathable air for individuals who may be trapped underground. Stip 21; ex. G-4, G-5, G-6, G-7. The PIB stated that it was advisory in

⁵ The parties submitted Joint Stipulations of Fact, which will be referred to as "Stip."

nature and identified several methods that might be used to provide post-accident breathable air in safe havens, including bore holes, compressed air lines, compressed air and oxygen cylinders, and chemical oxygen generators. Safe havens could be prefabricated refuge chambers, or pre-built or readily constructed barricades. It also specified that breathable air sources should be located within 2,000 feet of working sections, and that a 96-hour supply of breathable air should be provided for each miner, almost 20 times the air supply provided by SCSRs. The PIB established a deadline of March 12, 2007, as the date on which operators were required to submit revised ERPs for MSHA's review. Shortly before that deadline, the State of West Virginia published a listing of refuge chambers that it had approved for meeting its post-accident breathable air requirements. Ex. R-109. MSHA accepted use of state-approved chambers in ERPs. Tr. 72.

In the absence of a feasible means of providing a continuous supply of fresh air, e.g., through a borehole or compressed air line, available options for supplying post-accident breathable air consist of self-contained refuge chambers or barricades stocked with compressed air, compressed oxygen and CO₂ scrubbing systems. While six models of chambers have been approved by West Virginia and accepted by MSHA, there are currently no manufactured refuge chambers commercially available. Tr. 131, 246. However, several vendors have demonstration models. Refuge chambers would be placed in crosscuts near escapeways within 2,000 feet of working sections. Barricades would be either pre-constructed, or materials for constructing them would be stored in appropriate locations, along with other necessary equipment and supplies. Most mines have barricade and other supplies on hand. The remainder of the items are readily available, although there are currently some delivery problems with CO₂ scrubbing systems. Tr. 76, 165-67, 174, 177.

On March 12, 2007, Cumberland and Emerald submitted ERPs that specified that refuge chambers would be used to provide breathable air for trapped miners. Stip. 24, 25. Respondents' decisions to purchase refuge chambers, which are more expensive than barricade/supply systems, was based upon Foundation Coal's assessment that a "turn key" system would be far more likely to function as planned. As John M. Gallick, its vice-president for safety and health, explained, there was concern that miners who had unsuccessfully expended considerable effort to escape, would not be able to effectively erect barricades, purge air, and perform other time and effort consuming actions while wearing SCSRs and working in a contaminated atmosphere under very high stress. Tr. 227-29, 265-67.

On March 28, Cumberland submitted a revised ERP specifying that refuge chambers would be "maintained within 2,000 feet of each working section capable of providing 96 hours of breathable air for miners working on that section (up to 30 miners)." Ex. G- 9. Emerald submitted a substantially identical plan on April 2. Ex. G-22. Respondents' ERPs specified that the chambers would be ordered within 60 days of MSHA's approval of the chambers.⁶ MSHA

⁶ No refuge chambers have been tested by MSHA, and it has not approved any shelters for use in underground coal mines pursuant to its authority to approve equipment as suitable and

told Cumberland and Emerald representatives that, while refuge chambers were an acceptable means of isolating miners from hazardous environments and providing breathable air, the agency would not approve a provision in an ERP without submission of purchase orders for equipment for the refuge chambers.⁷ On April 20, Respondents solicited bids on an expedited basis from three providers of refuge chambers, including the vendor previously identified. Foundation Coal had selected inflatable chambers because they would be more suitable for their mines in West Virginia, which mined coal seams 42 inches high and were not “gassy.” They proposed to use the same shelters in the Emerald and Cumberland mines in order to remain consistent with equipment and training. Tr. 233. They have since reconsidered and believe that larger rigid refuge chambers would be more appropriate for their mines, which are in the gassy Pittsburgh seam where secondary explosions are more likely to occur. Tr. 235.

Further communications occurred between MSHA and Respondents. On April 28, Respondents submitted revised ERPs representing that they were “in the process of ordering refuge chambers” from a vendor, and further specifying a specific model number. Ex. G-10, G-23. The memorandum forwarding Cumberland’s revised plan referred to prior correspondence and a meeting that occurred on April 17, and stated that a purchase order would not be able to be submitted by close of business. It represented that a “terms and conditions” package would be sent to the vendor in less than 48 hours, and that a purchase order would be written when the terms and conditions had been agreed to. Ex. G-15. MSHA believed that Cumberland would supply a purchase order within a few days. On May 3, no purchase order had been submitted, and Cumberland was requested to supply, within five working days, a purchase order and a scheduled delivery date. Ex. G-16.

Questions arose in mid-April with respect to CO₂ scrubbing systems that were being used in some shelters. As noted in the PIB, CO₂ scrubbing is essential to preserve a life sustaining atmosphere in shelters without a continuous supply of fresh air. CO₂ scrubbing can be accomplished through active (fan driven) or passive (curtain) systems using one of two compounds that absorb CO₂, soda lime or lithium hydroxide. However, both compounds are caustic, and MSHA determined that handling of bulk compounds in a closed environment would pose an unacceptable risk. Tr. 171. Soda lime was used in bulk for at least one system. Respondents also developed concerns about whether quantities of soda lime sufficient to last 96 hours were being supplied. By April 25, MSHA determined to advise its district managers not to approve any post-accident breathable air ERP provisions that used bulk soda lime for CO₂ scrubbing. Ex. R-47; tr. 85, 129-30. The chamber vendor and compound suppliers reacted promptly, encapsulated the soda lime, and eliminated the bulk compound problem within seven

safe for use in mining environments. Stip. 28.

⁷ Most of MSHA’s Districts, including District 4 in which Foundation’s West Virginia mines are located, do not insist on the submission of purchase orders as part of the ERP. Stip. 26; ex. 45; tr. 123. They consider the issuance of a purchase order in determining whether to cite an operator for failure to timely implement its ERP.

to ten days. Tr. 86-87; ex. G-37. There is some question as to whether, or when, Respondents were advised that the issue had been resolved. Tr. 317; ex. G-12, G-37.

Another question raised by Respondents deals with temperature. An attachment to the PIB, notes as a "Safe Haven Assumption" a maximum temperature of 95 degrees. Ex. G-5. It also notes that "Not all mines will be able to successfully adopt all of these recommendations due to their inherent mining conditions." Ex. G-5 at 1. The reaction whereby lithium hydroxide absorbs CO₂ gives off more heat than does soda lime. Lithium hydroxide is typically impregnated into curtain material that is hung in the refuge area. It is a passive system, and simply absorbs CO₂ from the air. The heat generated produces convection air currents that make the curtains more efficient at scrubbing CO₂. Respondents were concerned that heat generation might result in excessive temperatures. However, there is no evidence that this is anything other than a theoretical problem. One such system has been tested in a chamber, apparently successfully. Tr. 242.

The CO₂ scrubbing questions prompted Respondents to reevaluate their plans to supply breathable air. The vendor they had been working with had been using a bulk soda lime scrubbing system. Tr. 260, 313. The State of West Virginia had requested that the National Institute of Occupational Safety and Health ("NIOSH") conduct tests on shelters it had approved.⁸ Foundation Coal also decided to do its own testing of CO₂ scrubbing systems. On May 9, Cumberland submitted a revised ERP that represented that it was evaluating refuge chambers of three vendors, and represented that a purchase order would be issued once testing verified that the CO₂ scrubbing systems met the requirements of the PIB. Ex. G-11.

MSHA viewed Cumberland's change in position, from submitting a purchase order for a specified chamber to evaluating several chambers with submission of a purchase order in 60 days, as a substantial retreat from any commitment to promptly implement its ERP. Tr. 104, 112. All of the mine operators in District 2 that had opted for chambers had already supplied purchase orders, and MSHA felt that Respondents should not be an exception. Tr. 105. On May 14, MSHA advised Cumberland that it would not approve the ERP, which committed to "purchase of essential protective mechanisms at an undetermined and distant future date," and that "a purchase order for material/equipment necessary to comply with [the post-accident breathable air] provision must be obtained and provided." Ex. G-17. Similar instructions on the requirement for a purchase order were communicated to Emerald on May 16. Both Respondents had also been previously advised of the requirement. Stip. 29, 30.

⁸ Section 13 of the MINER Act requires NIOSH to conduct research on refuge alternatives, including shelters, and submit a report by December 15, 2007. Within 180 days of receipt of the report, MSHA is required to provide a description of any actions the Secretary intends to take based upon the report. NIOSH circulated a draft protocol for its testing of refuge chambers on June 1, 2007. Stip. 27; ex. R-10. Testing was reportedly scheduled to commence on June 18 and be concluded by August 31. Tr. 249. Respondents had to abandon efforts to do their own testing because of delivery problems for CO₂ scrubbing materials. Tr. 276.

On May 18, both Respondents submitted revised ERPs indicating that they were in the process of evaluating shelters, and would submit purchase orders for shelters within 60 days of approval of their ERPs. Ex. G-12, G-24. The cover letters for the submissions requested information on commercially available CO₂ scrubbing systems, and protested the requirement for purchase orders. Stip. 31, 32; ex. G-14, G-29. On May 22, MSHA advised Cumberland that an impasse may have been reached with regard to its post-accident breathable air ERP provision, and requested clarification of the plan. Ex. G-18; stip. 33. On May 22, Cumberland submitted a revised plan, and again proposed to submit a purchase order within 60 days of plan approval. Stip. 34; ex. G-13. Emerald had similar communications with MSHA and submitted its revised ERP on May 24. Stip. 35, 36; ex. G-25. On May 23 and 25, MSHA notified Cumberland and Emerald respectively, that the post-accident breathable air portions of their latest ERPs were approved, with the exception of the 60-day purchase order submission, which had to be substantially shortened, e.g. to two days. Neither Respondent agreed to further reduce the period for submission of purchase orders, which triggered the instant citations and these proceedings.

Conclusions of Law - Further Factual Findings

The Secretary contends that the proper standard of review is whether the Secretary's refusal to approve the 60-day purchase order provision of the ERPs, and her requirement that purchase orders be submitted within ten days, were arbitrary and capricious. She accepted the burden of proof on those issues. Sec'y Legal Statement at 3.⁹ Respondents contend that Section 316(b)(2) of the Act is unconstitutionally vague, that the Secretary's use of the Program Information Bulletin to evaluate ERPs is contrary to law because it was not the subject of notice and comment rulemaking, and that the Secretary's refusal to approve the ERPs was contrary to law. As to the latter point, they dispute applicability of the "arbitrary and capricious" standard, contending that it "ignores the statutory criteria and is too weighted in the Secretary's favor." Resp. Br. at 28 n.20. However, they do not offer an alternative.

The Scope of these Proceedings

Commission Procedural Rule 24 specifies that "The scope of [a hearing on an ERP dispute] is limited to the disputed plan provision or provisions." Prior to the hearing, Respondents indicated a desire to litigate, in this proceeding, the validity of the citations' special findings dealing with negligence and gravity, and the Secretary requested that civil penalties be imposed if the violations were affirmed. As noted at the hearing, those issues will not be addressed in this proceeding. Tr. 17-26. The process established in the MINER Act for expeditious resolution of plan disputes was intended to quickly resolve disputes concerning the specific contents of ERPs, so that the benefits of the Act could be realized by miners. Entertaining other issues would unduly complicate these special proceedings and would detract

⁹ The Notice of Hearing required the parties to submit prehearing statements and memoranda of law addressing the issues to be decided, and the applicable legal standards, including burden of proof.

from the fair and efficient resolution of plan content disputes.¹⁰

For the same reasons, Respondents' constitutional challenge to the legislation and their procedural challenge to the PIB will not be entertained.¹¹ It should be noted that the PIB is the subject of a challenge as improper rulemaking in the United States Court of Appeals for the District of Columbia Circuit, Docket No. 07-1068. Stip. 23. Moreover, the Act's expedited plan dispute resolution process is intended to resolve disagreements over plan contents that have been negotiated to an impasse. All aspects of the post-accident breathable air portions of the ERPs, with the exception of the 60-day purchase order submission provision were approved by the Secretary. There is no plan content dispute with respect to any aspect of the PIB.¹²

I accept the Secretary's formulation of the issues. She has the burden of proving that the refusals to approve the specific plan provisions at issue, and to require abatement within ten days, were not arbitrary and capricious. *C.W. Mining Co.*, 18 FMSHRC 1740, 1746 (Oct. 1996) (absent bad faith or arbitrary action, the Secretary retains the discretion to insist upon the inclusion of specific provisions as a condition of the plan's approval); *Monterey Coal Co.*, 5 FMSHRC 1010, 1019 (June 1983) (MSHA's withdrawal of impoundment plan approval was not arbitrary and capricious).

¹⁰ Respondents contested issuance of the citations pursuant to section 105(d) of the Act. Separate Commission case files have been established for those proceedings, *Emerald Coal Resources, LP v. Secretary of Labor*, Docket No. PENN 2007-257-R; *Cumberland Coal Resources, LP v. Secretary of Labor*, Docket No. PENN 2007-258-R. Challenges to the special findings, as well as the constitutional and other issues Respondents seek to raise, can be litigated in those cases, or in the course of any subsequent civil penalty proceeding.

¹¹ I decline to reach Respondents' constitutional challenge to the statute, which is couched in terms of fair notice. However, as to any fair notice, due process, argument Respondents may be advancing as to the particular enforcement actions here, they clearly received actual notice of the district manager's requirement that purchase orders were required in substantially less than 60 days, well before enforcement action was taken. Actual pre-enforcement notice of the Secretary's position satisfies due process. *Consolidation Coal Co.*, 18 FMSHRC 1903, 1907 (Nov. 1996); *General Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C.Cir. 1995).

¹² Respondents contend that a provision of the PIB, specifying that ERPs must be implemented within 60 days brings the validity of the PIB into question. I disagree. While the Secretary's refusal to approve the disputed provisions was motivated by a desire to secure earlier implementation, the disputed plan provisions do not implicate the PIB. As Respondents note, the purchase order requirement was specific to ERPs that called for rescue chambers and was "contained in no writing other than the plan responses." Resp. Br. at 25 n.18.

Resolution of the Emergency Response Plan Disputes

The standards for resolving plan approval disputes are well settled. While the Secretary of Labor retains the ultimate authority and responsibility to determine the contents of the plan, her discretion is not unbounded. In discussing disputed provisions of an operator's ventilation plan, the Commission stated:

The requirement that the Secretary approve an operator's mine ventilation plan does not mean that an operator has no option but to acquiesce to the Secretary's desires regarding the contents of the plan. Legitimate disagreements as to the proper course of action are bound to occur. In attempting to resolve such differences, the Secretary and an operator must negotiate in good faith for a reasonable period concerning a disputed provision. Where such good faith negotiation has taken place, and the operator and the Secretary remain at odds over a plan provision, review of the dispute may be obtained by the operator's refusal to adopt the disputed provision, thus triggering litigation before the Commission. *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2773 (Dec. 1981).

Carbon County Coal Co., 7 FMSHRC 1367, 1371 (Sept. 1985).¹³

The Report of the Senate Committee on Health, Education and Welfare on the MINER Act, published on December 6, 2006, indicates that the established cooperative plan development, review and approval process was intended to apply to ERPs, including the resolution of disputes through issuance of a citation for a "technical violation." S. Rep. No. 109-365, at 4-5 (2006).¹⁴ That process was followed by the parties here. Extended negotiations took place over the content of the ERPs, with each Respondent submitting multiple draft documents. As early as March, there was agreement on virtually all aspects of the post-accident breathable air portions of the plans. The only disputes were whether and when purchase orders would be required. Respondents committed to provide purchase orders, but the parties remained at odds over the time period. Respondents did not retreat from their "60 days following plan approval" position. The Secretary sought significant reductions, at one time proposing submission within two days after plan approval, and eventually establishing ten days as the time to abate the citations.

¹³ Both the Secretary and the operator are obligated to engage in good faith negotiations and an operator who fails to do so may be precluded from challenging the denial of a proposed amendment. *Id.* and see *C.W. Mining Co.*, 18 FMSHRC at 1746-47; *Peabody Coal Co.*, 15 FMSHRC 381, 387-88 (March 1993).

¹⁴ A copy of the report was submitted as an exhibit by Respondents following the hearing. Ex. R-48. The Secretary did not object to its admission. It is admitted as part of the hearing record.

There is no question that Congress intended to promptly secure a substantial increase in the amount of post-accident breathable air available to trapped miners. The MINER Act's post-accident breathable air provisions are not couched with any delayed time frame language, such as the three years allowed for installation of flame-resistant directional life lines and wireless post-accident communication systems. 30 U.S.C. § 876(b)(2)(E)(iv) and (F)(ii). Provisions for post-accident breathable air were required to be included in ERPs adopted and submitted for approval by August 14, 2006. Moreover, post-accident breathable air is referred to in the "Immediate Requirements" section of the Senate Report. S. Rep. 109-365, at 6-7. The expedited plan dispute resolution process is further evidence that Congress intended that post-accident breathable air be expeditiously provided.

By the time the PIB was issued, in February 2007, MSHA had conducted a great deal of research on methods to provide post-accident breathable air, including the provision of breathable air in applications ranging from coal and metal mining to submarines and spacecraft. Tr. 152-55. It also had solicited and received information from the mining community. It was aware that there were tried and proven mechanisms to provide breathable air for extended periods of time, that were then commercially available.

Mine operators had to provide breathable air in safe havens, either barricades or refuge chambers. Barricades have been a method used by trapped miners in the past to enhance survival. All of the materials to provide a sustained supply of breathable air in a barricade-type shelter are either already maintained by operators, or are readily available. The only exception is CO₂ scrubbing materials, as to which there may be some delivery problems.

Prefabricated refuge chambers are a more recent development, but would work in much the same way as a barricade. However, there are currently no production models available, and it was clear that there were going to be delivery backlogs. Tr. 75. Significant delivery delays were expected, much more so than with CO₂ scrubbing materials. The district manager felt that filling in part of a component system would be quicker and easier than getting a whole system delivered. Tr. 142-43. Donald Foster, who was the point person for the district manager on ERP approvals, was of the opinion that under current market conditions it would "most definitely" take "significantly longer" to get delivery of a refuge chamber than components of a barricade system. Tr. 147. Purchase orders had been required for additional SCSRs, when manufacturers were overwhelmed with orders and delivery problems existed. Tr. 78, 131.

In light of these considerations, the district manager decided to require submission of purchase orders for refuge chambers as part of the ERP, in order to secure assurance that the operator was actually proceeding to implement the plan. He did not require purchase orders for components of barricade-type systems as part of an ERP. Under his approach, ERPs have been approved for 31 of the 33 underground coal mines in MSHA District 2. The only exceptions are Emerald and Cumberland. Tr. 64-65. Seventeen of the operators chose to use barricade systems. Their ERPs have been approved and they should be well on their way to actually implementing their plans. Fourteen of the operators chose rescue chambers and, by mid-May, all of them had

submitted purchase orders for the chambers they had chosen, either with their ERPs, or within ten days thereafter. Tr. 64-65, 74, 106. Those ERPs have also been approved and implementation will occur upon delivery of the chambers.

MSHA engaged in substantial negotiations with Respondents over the course of two months. Respondents had opted for refuge chambers in their March 12 ERPs, and were on the verge of providing purchase orders for specific refuge chambers as of April 20. Questions regarding the bulk soda lime CO₂ scrubbing systems that were used in those chambers, and MSHA's directive that such systems would not be approved, legitimately caused Respondents to delay moving forward. Those questions were quickly resolved, and MSHA expected a resumption of the process and prompt delivery of purchase orders. However, Respondents then began to reevaluate their choices of shelters. Because of the prevalence of methane in their mines and the likelihood of roof falls and secondary explosions, considerations known since the beginning of the process, they decided that rigid refuge chambers would be more preferable, and had actually settled on a vendor. Tr. 234-36, 292-93. As Gallick explained, the change in thinking was due to "more thought about the application" and "less corporate thought process" about getting the same shelters. Tr. 291-92. MSHA viewed Respondents' changed approach as a substantial regression in any commitment to promptly provide enhanced supplies of post-accident breathable air.

MSHA's district manager had no reason to doubt the effectiveness of the CO₂ scrubbing systems, which would be used in barricade or refuge chamber applications. The disapproval of the bulk soda lime systems had nothing to do with their effectiveness. His interest was in promptly securing the substantial enhancements to supplies of post-accident breathable air that were required under the MINER Act, as informed by the PIB. By May 25, all mine operators in his District had approved ERPs, with the exception of Respondents.

Respondents could have chosen barricade-type systems, had approved ERPs, and have largely implemented their plans. No concerns about CO₂ scrubbing systems should have deterred them, because if they proved less effective more material could simply have been provided, and the heat issue was not a concern for the larger barricaded areas. Tr. 281. They chose to purchase rescue chambers, and provided good reasons for doing so. The district manager did not veto that choice, even though it meant that delivery delays would push actual implementation well beyond that of a barricade-type system. Even after the delay since the March 12 ERP submission, had Respondents agreed to purchase the chambers within ten days, their ERPs would have been approved. However, Respondents refused to purchase the chambers for another 60 days. In light of the time that had already elapsed, and the fact that 14 other operators had submitted purchase orders for chambers, the district manager determined that 60 days was too long a delay for purchasing equipment with an uncertain delivery date. He insisted on a much shorter time period.

Respondents contend that the requirement to submit purchase orders is contrary to the Act's requirement that ERPs reflect the most recent credible scientific research and be

technologically feasible. 30 U.S.C. § 876(b)(2)(C). They claim that they refused to submit purchase orders until certain limited testing was completed, so that they could be assured that refuge chambers were technologically feasible and consistent with credible scientific research.¹⁵ Resp. Br. at 28, 33. This appears to represent a bit of a retraction of their disputed plan provisions, that purchase orders would be submitted within 60 days of plan approval. Cumberland's ERP was approved, with the exception of the disputed provision, on May 23. Had the disputed provision been approved also, its commitment would have been to provide purchase orders by July 22. It is doubtful that Respondents could have had any reasonable expectation that testing would have confirmed the technological feasibility of CO₂ scrubbing systems in refuge chambers within that time period. It is unclear whether they were aware, at that time, that NIOSH planned to commence testing on June 18. They certainly did not have the draft protocol, which was not circulated until June 1. They had planned to do their own testing, but that proved unavailing. While Gallick was confident that he would have preliminary test data "within 60 days," as phrased, that was 60 days from June 12, the hearing date, well past the ERP commitment. Tr. 275. In any event, if Respondents believed that refuge chambers were not technologically feasible, they should have removed them from their ERPs, and opted for barricade-type systems.

Respondents argue that "MSHA doesn't actually know if any of the systems will work in a mine environment." Resp. Br. at 34. However, there is little reason to question whether long-recognized effective methods to scrub CO₂ from the air will work as effectively in the mining environment as they have elsewhere. There is no real evidence to suggest that they will not, and the available evidence tends to confirm the effectiveness of the systems. A Canadian study involving 25 men in a shelter in an underground mine for 24 hours yielded results that "exceeded expectations." Tr. 283-84. A vendor of lithium hydroxide CO₂ scrubbing curtains has also performed testing of a chamber. While the results have not been made public, Gallick had been told they were "good." Tr. 242. Moreover, the refuge chamber used in that test appears to have been a rigid chamber which Respondents are interested in purchasing. Tr. 292-93. The CO₂ scrubbing technology is not new. It has been tried and proven effective in multiple applications. Tr. 168-70. Respondents recognize that there is no question that the "physics of scrubbing works." Tr. 297. MSHA's expert believed that the technology should be tested in the mining environment, but, he did not anticipate any substantial differences in performance. Tr. 197-98.

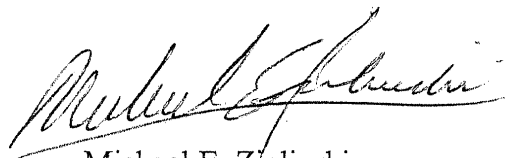
I find that the Secretary has carried her burden of proving that the refusals to approve the disputed ERP provisions, and to require submission of purchase orders within ten days, were not

¹⁵ At the hearing, Respondents also raised concerns about committing funds, significant non-refundable deposits, for the purchase of chambers that might not have proven to be effective. Tr. 247. However, they conceded that chamber vendors provided warranties that their products would meet all applicable requirements or guidelines in effect at the time of order confirmation, and would repair, replace or provide a refund if testing revealed that the chambers did not meet the breathable air requirements. Tr. 278-79. Respondents do not make an economic argument in their brief.

arbitrary and capricious. The district manager's decisions were reasonable, and the fact that most other district managers decided not to require purchase orders as part of ERPs doesn't alter that conclusion.

ORDER

Citation Nos. 7020004 and 7020005 are **AFFIRMED**. Respondents are directed to include in their Emergency Response Plans a commitment that purchase order(s) for refuge chambers shall be submitted to the Secretary's Mine Safety and Health Administration (MSHA) on or before July 9, 2007.¹⁶



Michael E. Zielinski
Administrative Law Judge

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¹⁶ The tenth day from the date of this decision, July 7, 2007, falls on a Saturday. Accordingly, the revisions to the ERPs are due on Monday, July 9, 2007. Section 316(b)(2)(F)(iii) of the Act provides that any decision requiring the inclusion of a disputed plan provision will not be limited by any appeal unless such relief is requested by the operator and permitted by the Administrative Law Judge. Any stay sought by Respondents will be denied. The date by which purchase orders must be submitted under this decision is only a few days earlier than when Respondents committed to provide them. Had Cumberland's provision been approved along with the rest of the ERP on May 23, purchase orders would have been required by July 22. Moreover, it is apparent that Respondents have made decisions about what products they intend to purchase, and have been in a position since late April to make purchase commitments. In addition, if the NIOSH testing commenced on June 18, Respondents should have access to some of the preliminary data they sought. In any event, the ten days allowed in the decision will provide ample time to seek relief from the Commission in the event of an appeal.